

LEASE TERMINATION: USE OF SUMMARY DISPOSSESS PROCEEDINGS TO EFFECTIVELY TERMINATE A FRANCHISE

I. INTRODUCTION

Growth in the number of franchised businesses and in the volume of business done by franchises in the last 25 years has made franchising a significant part of the business world. Franchised businesses account for an estimated 100 billion dollars of business annually, ten percent of the gross national product and 25 percent of all retail sales.¹ The courts and legislative bodies have been slow in reacting to the problems presented by the franchisor-franchisee relationship. The substantial growth of franchising has aggravated the existing problems.

The term franchise is quite broad and describes several different kinds of relationships among the parties. For purposes of this article, the term franchise is meant to include specifically the situation in which the franchisee makes a contribution of capital to the enterprise. Although the same potential for abuse may exist in other types of franchising relationships and much of what is said here is applicable to franchising generally, the focus of this study is that more narrow circumstance.

The franchisor-franchisee relationship is created by a contract, the terms of which the courts have been reluctant to vary because of an historical respect for freedom of contract. The relative bargaining positions of the parties have received little notice. The significance of the parties' relative bargaining positions is seen most readily by consideration of termination clauses included in the franchise agreements. Such clauses allow the franchisor to cancel the agreement upon the failure of the franchisee to meet certain conditions or covenants included therein. Some agreements provide that the franchisor may terminate at will, if the specified notice period is observed. While the franchisor should have the power to terminate the franchise where, for example, the franchisee fails to observe product quality standards which are reasonable and set in good faith by the franchisor, the standard termination clause presently used effectively provides for termination at the will of the franchisor. Such discretionary termination conditions result in abuse of the franchise relationship to the detriment of the franchisee.

A few courts have recognized the need to limit the franchisor's virtually unlimited right to terminate when such termination is not for cause.² However, franchisors may circumvent even this minimal limitation in jurisdictions where such is recognized, by leasing or subleasing to

¹ See Brown, *Franchising—A Fiduciary Relationship*, 49 TEXAS L. REV. 650 (1971) [hereinafter cited as Brown]; Ray, *Current Franchising Problems: A Rollback of Caveat Emptor*, 8 AM. BUS. L.J. 231, 232 (1971).

² See Brown, *supra* note 1; Gellhorn, *Limitations On Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465.

the franchisee the site upon which the franchised business is operated, and inserting a clause in the lease providing that the breach of any of the terms of the franchise agreement constitutes a breach of the lease, thus resulting in its termination. The franchisor may then seek to regain possession of the site by summary dispossession proceedings in which the only question is right to possession of the property. The lease having been terminated, the franchisee has no right to possession; and having lost the site of the franchised business, the franchisee has effectively lost his franchise.

This note discusses some of the ways to limit the present and potential abuse of summary dispossession proceedings. Several methods to halt the abuse are considered:

- (1) the imposition of fiduciary obligations on the franchisor, due to the nature of the franchisor-franchisee relationship, thereby effectively limiting the power of the franchisor to terminate the agreement or lease;
- (2) application and expansion by courts in summary dispossession proceedings of the limitations on franchise terminations to the lease terminations;
- (3) use of the antitrust laws to enjoin any action in the summary dispossession proceedings until the alleged antitrust violations (which could affect the franchisor's right to terminate the lease) have been litigated.³

II. SUMMARY DISPOSSESSION PROCEEDINGS

In most states, summary dispossession proceedings are authorized by forcible entry and detainer statutes.⁴ As the name of these statutes suggests, summary dispossession proceedings are employed in those situations in which someone not entitled to possession forcefully gains possession of the property and so retains possession. Also covered by these statutes are those instances where a lease has been terminated and the tenant is "holding-over" after the term of his lease has ended (which would be the position of a franchisee whose lease had been terminated and who was struggling to retain his franchise). Some states have unlawful detainer statutes⁵ which deal specifically with the hold-over tenant. Under most of the forcible entry and detainer statutes, as well as the unlawful

³ No attempt is here made to deal with the antitrust problems in any detail. They are merely pointed up for consideration by the reader. The bulk of the arguments here presented are focused around the imposition of fiduciary obligations on the franchisor, and on the extension of limitation on franchise termination and/or lease termination.

⁴ See, e.g., CAL. CIV. PRO. § 1161 (West 1955); ILL. ANN. STAT. ch. 57, § 2 (Smith-Hurd 1951); MASS. GEN. LAWS ANN. ch. 239, §§ 1-3 (1956); MICH. STAT. ANN. § 600.5634 (1967); MO. ANN. STAT. § 534.030 (1953); N.Y. REAL PROP. ACTIONS §§ 701-767 (McKinney 1965); OHIO REV. CODE ANN. §§ 1923.01-.02 (Page 1968); PA. STAT. ANN. t. 68, §§ 250.501-.510 (1965).

⁵ See, e.g., CAL. CIV. PRO. § 1161 (West 1955); MO. ANN. STAT. § 534.030 (1953).

detainer statutes, the sole issue is right to possession of the property.⁶ The right to present any counterclaims or affirmative defenses is denied,⁷ and presentation of equitable defenses, if not denied, is strictly limited.⁸ The landowner, by showing his right to possession (the lease having been terminated), is entitled to a writ of dispossession, forcing the hold-over tenant to abandon the property.

One important problem which affects a significant number of franchisees is that it is possible for the franchisee to have his franchise effectively terminated by a process affording little opportunity for defense in cases where he has a lease or sublease from the franchisor.⁹ In almost 40 percent of the fast food franchises, the franchisee leases or subleases the land and buildings from the franchisor.¹⁰ The potential for effectively terminating franchises by terminating the lease is obvious.

Presently, the franchisee is not without legal remedies. There are damage remedies, but the problems of proof inherent in all damage actions are present. Besides, while the damage suit is pending, the franchisee, having at least temporarily lost his business, often has no means of livelihood. The expense involved in prosecuting any action is substantial even when a source of income is available, but when the plaintiff has been deprived of his income, such expense may represent an insurmountable barrier.

Perhaps the best and most logical way to ameliorate the problems presented by the summary dispossession proceedings is to permit the presentation of equitable defenses in such proceedings directly. In *Rosewood Corp. v. Fisher*,¹¹ the Illinois Supreme Court interpreted the state's forcible entry and detainer statute,¹² in conjunction with its Civil Practice Act,¹³ to allow equitable defenses to be presented to and determined by the court

⁶ See, e.g., *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970); *White v. Ziegenhardt*, 339 Mich. 195, 63 N.W.2d 625 (1954); *Drzewiecki v. Stock-Daniel Hardware Co.*, 293 S.W. 441 (Mo. Ct. App. 1927).

⁷ See, e.g., *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970).

⁸ See, e.g., *Wehmeier v. Young*, 9 Mich. App. 65, 155 N.W.2d 885 (1967); *Drzewiecki v. Stock-Daniel Hardware Co.*, 293 S.W. 441 (Mo. Ct. App. 1927).

⁹ There is no empirical data available as to the frequency with which these abuses occur. Harold Brown points out in his article, *supra* note 1, the tremendous turn-over per year in service station franchises. Probably a significant factor in this turn-over is the wide-spread practice of leasing the site to the franchisee with termination provisions. For examples of the franchisor having terminated a lease and having instituted summary dispossession proceedings, see *Helfenbein v. International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971); *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970).

¹⁰ U. B. OZANNE and S. D. HUNT, *THE ECONOMIC EFFECTS OF FRANCHISING*, at 4-29 to 4-30 (1971). Relatively few studies have been done on franchised businesses. However, a comprehensive study of fast food franchised businesses was undertaken and the results were published in the study cited above.

¹¹ 46 Ill. 2d 249, 263 N.E.2d 833 *cert. denied*, 401 U.S. 928 (1970).

¹² ILL. ANN. STAT. ch. 57 (Smith-Hurd 1951).

¹³ ILL. ANN. STAT. ch. 110 (Smith-Hurd 1968).

in a summary dispossess hearing.¹⁴ The court stated that when the defendant presents equitable defenses the trial court must exercise its discretion, ordering such payments as it deems proper and providing for any other equitable arrangements necessary to protect the property and interests of all the parties during the pendency of the litigation.¹⁵ By employing this procedure the court is able to protect the property interests of the plaintiff (owner, landlord, franchisor) while affording some protection for the interests of the defendant (tenant franchisee). The court in *Rosewood* allowed equitable defenses which it felt were needed to permit "necessary equitable relief."¹⁶ Therefore, the question of what constitutes an "equitable defense" sufficient to require the court to grant "necessary equitable relief" is an important one to the franchisee.

III. NECESSARY EQUITABLE RELIEF

A. *Implicit in the Nature of the Relationship in Franchising*¹⁷

What kind of a relationship is the franchisor-franchisee relationship? Are the franchisor and franchisee merely independent businessmen? It has been suggested that the franchise arrangement produces a fiduciary relationship,¹⁸ and if so, the franchisor's power to terminate would be severely limited. One possibility then is that a court in a summary dispossess proceeding might allow the franchisee to show the existence of a fiduciary relationship as an "equitable defense" to allow "necessary equitable relief."

In order to assess the contention that the franchise arrangement produces a fiduciary relationship it is necessary to determine what the basis is for such a relationship. In response to this problem, the Illinois Supreme Court stated that confidence reposed in one side, resulting in domination and influence over the other, should be the test:

[C]ourts of equity will not set any bounds to the facts and circumstances out of which a fiduciary relationship may spring. It includes not only all legal relations such as guardian and ward, attorney and client, principal and agent and the like, but it extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other. . . . The relationship need not be legal, but it may be moral, social, domestic or merely personal.¹⁹

¹⁴ 46 Ill. 2d 249, 257-8, 263 N.E.2d 833, 838, *cert. denied*, 401 U.S. 928 (1970); *see also* *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970).

¹⁵ 46 Ill. 2d 249, 258, 263 N.E.2d 833, 839, *cert. denied*, 401 U.S. 928 (1970).

¹⁶ *Id.*, 263 N.E.2d at 838.

¹⁷ A significant portion of the analysis in this subsection is drawn from Brown, *Franchising—A Fiduciary Relationship*, 49 TEXAS L. REV. 650 (1971).

¹⁸ Brown, *supra* note 1.

¹⁹ *Children's Home of Rockford v. Andress*, 380 Ill. 452, 465, 44 N.E.2d 437, 443 (1942) (citations omitted).

Likewise, the California Supreme Court pointed to the significance of control by one person over the property of another.²⁰ Most importantly, the Illinois decision suggests a broad definition of a fiduciary relationship to be used by courts of equity.

Does the franchise arrangement meet either or both of the criteria mentioned above? In order to meet the "control" criterion, the franchisor must have dominion over the property of the franchisee. It is, therefore, necessary to find that the franchisee has contributed capital to the enterprise. Control of the franchisee's property by the franchisor must then also be found. At the heart of most franchise agreements is a trademark licensing agreement. The use and licensing of trademarks is regulated by the Lanham Act²¹ which permits the use of the trademark by a *related* company, provided the licensor adequately *controls* the licensee. The question then is whether the minimum control which must be exercised by the franchisor under the requirements of the Lanham Act is sufficient to impose fiduciary obligations on the franchisor. In a California decision dealing with the extent of control required to create a fiduciary relationship, the court found that the husband's management and control over the community property placed him in the status of trustee for his wife's interest in the community property.²² The control (and management) in this case appears to have been exclusive control over the property of another. However, if the broad definition of the fiduciary relationship as used by the Illinois court is adopted and combined with the control definition suggested by the California court, a strong argument can be made that less than exclusive control over the property of another should still be enough to create a fiduciary relationship.

The minimal control required by the Lanham Act is very often exceeded by the actual control exercised by the franchisor. The control enjoyed by the franchisor is substantial, regulating the "quality" of the product or service being sold. The subjective nature of the term "quality" results in uncertainty concerning the extent of control required by the Lanham Act and also allows the franchisor, on the theory that he is protecting the quality of his product, to exercise such a degree of control over the franchisee to indicate that a fiduciary relationship is created by such control. The description of the franchise relationship, quoted below, buttresses the argument that a franchisor often does enjoy a significant amount of control over the franchisee:

There is a marked, intentional, and constantly emphasized disparity in the positions of the parties—the franchisor combining the roles of

²⁰ *Vai v. Bank of America*, 56 Cal. 2d 329, 338, 364 P.2d 247, 253, 15 Cal. Rptr. 71, 77 (1961).

²¹ 15 U.S.C. §§ 1055, 1064(e)(1), 1127 (1964).

²² *Vai v. Bank of America*, 56 Cal. 2d 329, 338, 364 P.2d 247, 253, 15 Cal. Rptr. 71, 77 (1961).

father, teacher, and drill sergeant, with the franchisee relegated to those of son, pupil, and buck-private, respectively. At the core of the franchise relationship is the contractual control exercised by the franchisor over every aspect of the franchisee's business. Starting with the advertisement which calls for "no experience," the franchisor inculcates the franchisee with the necessity of being taught, guided, and controlled not only during the initial training period but throughout the existence of the franchise. The franchisor controls the site, commissary purchases, purchases from other vendors, method of business operations, labor practices, quality control, merchandising, and even record keeping. This control is buttressed by the contractual requirement that the franchisee must obey the command of the Operating Manual as expounded by the franchisor's supervisor, on pain of losing the franchise if he disobeys them and under constant threat of such termination. And upon termination, or failure to renew, the franchisee is confronted with the covenant not to compete and forfeiture of his equity in the business.²³

The court in the Illinois decision stated that a court should look to the facts and circumstances, not just to the legal relationships, to determine if a fiduciary relationship exists.²⁴ It is difficult to argue that "facts and circumstances" as stated in the above description of a franchise should not be found sufficient, given criteria of control and confidence, to result in a finding of "fiduciary relationship" by a court of equity. The control suggested by that description is nearly exclusive; the "confidence reposed on the one side" and the "resulting domination and influence on the other side," to which the Illinois court looked to find a fiduciary relationship, is clearly present. Where such control and dependence exist, the courts should recognize the existence of a fiduciary relationship. It is not here contended that all franchise relationships are like the one described previously, but the courts should look to the "facts and circumstances" of each case to see if such a relationship (or one similar) does exist in justly deciding the case.

Although courts of the United States have been slow to consider the applicability of fiduciary obligations to franchising, a Canadian court has considered such applicability. Basing its holding on equitable concepts, the court concluded:

In this particular type of relationship, it appears . . . that franchisor and franchisee are bound together over a long period of years in a relationship which in many respects is almost as close as that of master and servant. While of course it is not the same, nevertheless the relationship is so close that confidence is necessarily reposed by the one in the other.²⁵

The court there held that the abuse of such confidence through self-preference was actionable. The applicability of fiduciary obligations to fran-

²³ H. BROWN, *FRANCHISING: TRAP FOR THE TRUSTING* 41 (1969).

²⁴ See text accompanying note 19 *supra*.

²⁵ *Jirna, Ltd. v. Mister Donut of Canada, Ltd.*, 3 Ont. 629, 639-40 (High Court of Justice 1970).

chising have also been recognized, at least informally, here in the United States by the Federal Trade Commission. General Counsel of the Federal Trade Commission stated:

[F]ranchisors frequently speak of their relationship with the franchisees as being one of trust and confidence. It is truly a fiduciary relationship.²⁶

The courts in the United States should formally recognize the applicability of fiduciary obligations to franchising.

After recognizing the fiduciary relationship in the franchising arrangement, a court in a summary dispossess proceeding should permit the franchisee to present the defense of the franchisor's fiduciary obligations as a requisite to equitable relief. Courts should look to the termination of the franchisee's lease to determine if the franchisor, in terminating the lease (and therefore effectively the franchise) has breached his obligations. When the court finds a breach of fiduciary duty, it should refuse to grant the summary dispossess order. The termination of the lease could not then be used as a subterfuge, effectively terminating the franchise, when the franchise itself could not be directly terminated.

B. *Limitations on Franchise Terminations*²⁷

There are several direct limitations placed on contract terminations; however, these limitations are narrow in scope. Among them are the defenses of economic duress, waiver and estoppel. In some instances, a requirement of reasonableness or "good faith" is made an integral part of the agreement, or a reasonable time is granted for the franchisee to recoup his losses. Additionally, a tort action may be available to the franchisee, but for all practical purposes, when recovery for termination of a franchise is sought, the franchisee must show that the original offer by the franchisor was fraudulent.²⁸ Unconscionability is yet another defense to franchise termination that could be extended to lease termination.

The defense of economic duress, although not yet recognized or applied in the franchise termination situation by the courts, could arguably be applied where unjust enrichment of the terminating party would result from enforcement of harsh termination provisions.²⁹ Waiver and estoppel may be effective defenses where the franchisee can show that the franchisor dispensed with the performance by the franchisee of a condition in the contract (waiver) or that the franchisee was led to reasonably rely on the

²⁶ *Hearings on the Impact of Franchising on Small Businesses Before the Subcomm. on Urban and Rural Economic Development of the Senate Select Comm. on Small Business*, 91st Cong., 2d Sess. 329 (1970) (statement of John V. Buffington, General Counsel, FTC).

²⁷ A significant portion of the analysis in this subsection is drawn from Gellhorn, *supra* note 2. For a more extensive analysis of some of the ideas presented in this subsection, see this source.

²⁸ Gellhorn, *supra* note 2, at 485.

²⁹ *Id.* at 486.

non-enforcement of a condition which the franchisor now attempts to enforce.³⁰

Limitations of "reasonableness" as to franchise terminations have been applied by some courts in borrowing the "Missouri doctrine" from agency law.³¹ These cases suggest the necessity of giving a reasonable time or fair opportunity for the franchisee to recover his expenditures before allowing the franchisor to terminate, especially where there has been substantial investment by the franchisee and the franchise does not state a definite duration.³² Although most franchise agreements provide for a definite term, when the clauses and conditions in the agreement provide for (or effectively permit³³) termination at will, it would seem that the limitations permitting a fair opportunity to recover the investment should be applied.

What constitutes a reasonable time must be determined from the circumstances at the time of the franchisor's attempt to terminate.³⁴ In deciding what was a reasonable time to recoup the investment, the cases have measured the period from the time the relationship began to the time of the attempted cancellation and have provided for a one to three year minimum as "reasonable."³⁵ In *General Tire & Rubber Co. v. Distributors, Inc.*,³⁶ the court suggested several factors which should be considered in determining a "reasonable time":

1. the amount of preliminary and promotional expenditures;
2. the length of time the distributorship [franchise] has been in operating before notice of termination;
3. what the prospects for future profits are; and
4. whether it [the franchise] has proven profitable during actual operation.

Although the allowance by courts of a "reasonable time" to recoup the investment is a step toward protecting the franchisee, it must here be recognized that it only prevents sudden termination. Rather than preventing termination, it merely lengthens the process.

Good faith in terminating the contract is another possible limitation on the lease termination. Courts in many states have recognized that good faith and fair dealing are implicit parts of a contract.³⁷ In *Goltra v.*

³⁰ *Id.* at 486-89.

³¹ *Id.* at 479.

³² *Id.* at 480.

³³ Brown, *supra* note 1, at 662: "The usual requirements of the franchise contract are impossible to attain, so that it may well be said that franchisees are always in default."

³⁴ *Entis v. Atlantic Wire & Cable Corp.*, 335 F.2d 759, 763 (2d Cir. 1964).

³⁵ See, e.g., *Hunt Foods v. Phillips*, 248 F.2d 23 (9th Cir. 1957) (16 months not a reasonable time); *J. C. Millert Co. v. Park & Tilford, Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954) (one year minimum); *Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12 (1957) (*rehearing denied*, 1958) (three years not unreasonable as minimum).

³⁶ 253 N.C. 459, 472, 117 S.E.2d 479, 489 (1960).

³⁷ See, e.g., *Goltra v. Weeks*, 271 U.S. 536 (1925); *Earle R. Hanson and Assoc. v. Farmer Co-op Creamery Co.*, 403 F.2d 65 (8th Cir. 1968); *Deering Milliken Research Corp. v.*

Weeks,³⁸ the United States Supreme Court dealt specifically with the situation described in this article concerning the significance of a good faith limitation. The Court said:

The cases leave no doubt that such a provision [the stipulation that the lessor could terminate the lease if in his judgment the lessee was not complying with the obligations of the contract] for termination of a contract is valid, *unless there is an absence of good faith in the exercise of judgment*.³⁹

A court in a summary dispossession proceeding, considering the Supreme Court's statement in *Goltra*, should determine whether the termination was in good faith.

A caveat, however, against placing great reliance on the good faith limitation on terminations is that it is not particularly effective in preventing unfair terminations.⁴⁰ For example, the lessor-franchisor might in good faith decide to terminate the lease when the lessee-franchisee has breached a covenant to buy certain goods from the franchisor; yet the termination may be unfair to the franchisee because of other effects triggered by termination (*e.g.*, buy-back clause may cause forced sale prices; or lack of a reasonable time for the franchisee to recoup his investment may cause substantial and unnecessary loss). These and other abuses may result, but the termination itself would still be in good faith.⁴¹

Unconscionability of the contract or of certain terms of the contract is another possible limitation on the right to terminate. Historically, the courts of equity limited unconscionability as a defense to contracts which had sunk to "madman levels," where a man in his right senses would not accept the terms.⁴² However, "as a result of agitation for its applicability to inconsistent standardized contract terms which were not negotiated and because of its inclusion in the Uniform Commercial Code,"⁴³ there has recently been a significant change in the applicability of the doctrine of unconscionability.

Textured Fibres, Inc., 310 F. Supp. 491 (D.S.C. 1970); *Beaugureau v. Beaugureau*, 11 Ariz. App. 234, 463 P.2d 540 (1970); *Davis v. Kahn*, 7 Cal. App. 3d 868, 86 Cal. Rptr. 872 (1970); *Griswald v. Heat, Inc.*, 108 N.H. 119, 229 A.2d 183 (1967); *Division of Triple T Service, Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 304 N.Y.S.2d 191 (Sup. Ct. 1969), *aff'd mem.*, 311 N.Y.S.2d 961 (App. Div. 1969); *Tharpe v. G. E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970); *Golden State Mutual Life Ins. Co. v. Kelley*, 380 S.W.2d 139 (Tex. Ct. App. 1964); *Shaw v. E. I. DuPont De Nemours & Co.*, 126 Vt. 206, 226 A.2d 903 (1967).

³⁸ 271 U.S. 536 (1925).

³⁹ *Id.* at 548 (emphasis added).

⁴⁰ Gellhorn, *supra* note 2 at 504-5.

⁴¹ It is possible that when termination triggers events which cause an unconscionable loss of property to the franchisor, it can never be said to be "in good faith," at least when the franchisor knows such losses are sure to ensue. This comment, however, is limited to the question of whether the franchisor had sufficient reason to terminate the lease. "Good faith" is here limited to such considerations. For a consideration of the effect of clauses affecting such unconscionable loss, see text immediately following.

⁴² Gellhorn, *supra* note 2, at 490.

⁴³ *Id.* at 508.

There is an "uneasy consensus" that the definition of goods in § 2-102 of the Uniform Commercial Code⁴⁴ is too narrow to include the entire franchise agreement.⁴⁵ But the policy behind the Code concept of unconscionability would be equally as applicable to franchise agreements as to sales agreements. Section 2-302 provides for relief from unconscionable contracts and contract terms. The Comment following that section states that the test for unconscionability should be whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be oppressive. Since the UCC has been adopted in 49 states there would seem to be an agreement as to what is unconscionable in the commercial world, at least in regard to sales. Due to the wide acceptance of this definition and the clearly commercial nature of franchising, the application of this definition to franchising would seem only logical. Where in light of the general commercial background and the needs of the particular trade the terms are oppressive, the relief available under § 2-302 should be granted; that it is the termination of a *lease* contract that is involved in summary dispossess proceedings should not present an insurmountable obstacle, since the policy behind the unconscionability doctrine (the prevention of oppressively one-sided contracts) is applicable to such a contract as well. Some courts have already applied the substance of some of the Article Two (Sales) sections to a lease contract, stating that the policy reasons behind the Code sections were applicable to leasing contracts as well as to sales contracts,⁴⁶ and others have intervened on equitable grounds under particular circumstances to prevent the termination of a *lease* for a breached covenant or condition where the termination (or forfeiture as the cases refer to it) would clearly lead to an unduly oppressive result.⁴⁷

An article entitled *Limitations On Contract Termination Rights—Franchise Cancellations*⁴⁸ suggests a standard which goes beyond that provided by UCC § 2-302 and that set by the equity courts:

[W]here it appears that the termination conditions seem unfair even though they meet the business practices of the industry and were negotiated, their fairness could be tested by requiring that *the condition which "creates" the right to terminate the agreement in one party must bear a reasonable relationship to the risks sought to be allocated and the benefits granted by the agreement.*⁴⁹

⁴⁴ Uniform Commercial Code § 2-102 [hereinafter cited as UCC].

⁴⁵ Ray, *supra* note 1, at 236.

⁴⁶ See Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

⁴⁷ See Dreisonstok v. Dworham Bldg. Corp., 264 Md. 50, 284 A.2d 400 (1971); Howard Johnson Co. v. Madigan, — Mass. —, 280 N.E.2d 689 (1972); Fly Hi Music Corp. v. 645 Restaurant Corp., 64 Misc. 2d 302, 314 N.Y.S.2d 735 (Civ. Ct. 1970); Hyman v. Cohen, 73 So.2d 393 (Fla. 1954).

⁴⁸ Gellhorn, *supra* note 2.

⁴⁹ *Id.* at 512 (emphasis in the original).

In adapting this unconscionability test to the termination situation and focusing upon the time of termination, it is further suggested that the test might be:

[W]hether the harm which will or is likely to result to the terminated party from enforcing the termination provision is proportional to the harm which will or is likely to result to the terminating party if the provision is not enforced.⁵⁰

"Disproportionate" harm is the harm which this test would seek to prevent.⁵¹

This standard is workable and flexible. The test is also easily adaptable to lease terminations. When the harm which would be suffered by the lessee upon termination is disproportionately greater than that which would be suffered by the lessor should the termination be disallowed, the writ of dispossession should not issue. The courts' options could be those provided in UCC § 2-302:⁵²

1. refusal to enforce the contract;
2. enforcement of the remainder of the contract without the unconscionable clause; or
3. limitation of the application of any unconscionable clause so as to avoid the unconscionable result.

In the case of a "terminated" lessee, one of the latter two remedies might be more appropriate.

IV. ANTITRUST VIOLATIONS

To speak of antitrust problems involved in "franchising" is really to speak about almost the entire antitrust field, for it is difficult to think of any aspect of antitrust that would be irrelevant.⁵³

It is not the purpose of this note to go into the merits of the various possible antitrust claims, but merely to bring to the reader's attention the possibility of their existence and the use of such claims in attempting to prevent the issuance of the dispossessory warrant in summary dispossess proceedings. Sections of franchising agreements which may violate antitrust law may include tying arrangements, exclusive dealing arrangements, territorial restrictions, customer restrictions, price fixing, and price discrimination.⁵⁴

⁵⁰ *Id.* at 517-8 (emphasis omitted).

⁵¹ *Id.* at 518.

⁵² *Id.* at 520.

⁵³ Pollock, *Antitrust Problems in Franchising*, 15 N.Y.L. FORUM 106 (1969).

⁵⁴ Averill, *Sealy, Schwinn and Sherman One: An Analysis and Prognosis*, 15 N.Y.L. FORUM 39 (1969); Borowitz, *Pricing Problems in Distributor and Franchise Systems*, 38 U. CIN. L. REV. 258 (1969); Hoerner, *Some Issues in Tying and Exclusive Dealing*, 38 U. CIN. L. REV. 233 (1969); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products*, 13 ANTI-

The allegation of an antitrust violation may be useful to the franchisee although the various states have treated differently the question of the defensive use of alleged antitrust violations. Some states have allowed their defensive use,⁵⁵ while others have not.⁵⁶ It is necessary then to determine whether or not the state in which the dispossessory proceedings are taking place normally allows the defensive use in its state courts of the alleged antitrust violations. Even if they do allow such defenses, the problem of submitting defenses in summary dispossess proceedings still exists.⁵⁷

If the defenses are not permitted to be introduced in that proceeding or if the forum state does not allow the defensive use of alleged antitrust violations, another alternative is available. Under § 16 of the Clayton Act⁵⁸ where an antitrust violation can be shown along with an immediate danger of irreparable harm or loss, a federal court may be willing to issue a preliminary injunction, enjoining or staying further action in the summary dispossess proceeding until the antitrust claim is adjudicated.⁵⁹ A possible obstacle is the provision in § 16 that an injunction shall issue "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."⁶⁰ The problem presented by this language is that the franchisee is a party to the contract which he alleges to be in violation of the antitrust laws. Since equity refuses to grant relief where the person seeking relief does not have "clean hands," a court of equity may look to the contract to determine whether the plaintiff is eligible for equitable relief. In so doing, it may of course realize that in the franchise relationship a great disparity in the positions of the parties often exists.⁶¹ It has been recognized that even though a party might be considered "technically

TRUST BULL. 161 (1968); Pogue, *Vertical Restrictions on Price, Territory and Customers—The Certainty of Uncertainty*, 29 OHIO ST. L.J. 272 (1968); Pollock, *supra* note 53; Rowland, *Designing Distribution Systems: Antitrust Problems in Franchising and Marketing*, 34 MO. L. REV. 178 (1969); Sadd, *Territorial and Customer Restrictions After Sealy and Schwinn*, 38 U. CIN. L. REV. 249 (1969); Wilson, *Exclusionary Restraints and Franchise Distribution*, 12 ANTITRUST BULL. 1169 (1967); Note, *Selected Antitrust Problems of the Franchisor: Exclusive Arrangements, Territorial Restrictions, and Franchise Termination*, 22 U. FLA. L. REV. 260 (1969); *Antitrust Laws-Tying Arrangements-Franchisor's Tying Purchase of Supplies to Licensing of Trade Name Held Unjustified by Alleged Business Necessity, and Damages Awarded to Franchise—Siegel v. Chicken Delight, Inc.*, 84 HARV. L. REV. 1717 (1971).

⁵⁵ *Vendo Co. v. Stoner*, 105 Ill. App.2d 261, 245 N.E.2d 263 (1969); *Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 315 N.Y.S.2d 897, *aff'd*, 36 App. Div. 2d 582, 318 N.Y.S.2d 924 (1970).

⁵⁶ *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970); *Burgess v. Hogan*, 175 So. 2d 924 (La. Ct. App. 1965); *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 110 N.W.2d 348 (1961).

⁵⁷ See text accompanying notes 6-8 *supra*.

⁵⁸ 15 U.S.C. § 26 (1958).

⁵⁹ 15 U.S.C. § 26 (1958). See *Helfenbein v. International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971); *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970).

⁶⁰ 15 U.S.C. § 26 (1958).

⁶¹ See text accompanying note 23 *supra*.

in pari delicto," a court may look to the circumstances of the parties, and relief is not necessarily barred by "technically unclean hands."⁶² A temporary injunction may issue against the enforcement of the provisions of a contract while the validity of the contract is dispute.⁶³ In the franchise situation, although it is the validity of the various terms of the contract rather than the validity of the contract as a whole which is in dispute, it seems that the principle should still apply. It should be possible for the franchisee to prevent the issuance of the dispossessory warrant either by presenting the antitrust violations as a defense or through injunctive proceedings in the federal courts.

V. CONCLUSION

Where the franchise premises are leased from the franchisor with the franchise agreement's conditions and covenants incorporated into the lease, allowing termination of the lease upon default of any condition or covenant, and where summary dispossess proceedings are available after such termination, the potential for abuse is clear. In the summary dispossess proceeding in the state court, this potential for abuse should be recognized, and courts should show a willingness to critically evaluate the franchise relationship. When the court finds the requisite control over the property of the franchisee it should impose fiduciary obligations upon the franchisor. Such fiduciary obligations might well affect the franchisor's power to terminate the lease of the franchisee. Recognition of the potential for abuse in summary dispossess hearings requires a willingness to hear such defenses as are necessary for equitable relief. When such defenses are valid, terminations should be limited to the extent necessary to do justice to all parties involved.

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⁶² King v. Spina, 148 F.2d 647 (2d Cir. 1945).

⁶³ *Id.*